NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES *ex rel.* THOMAS A. BERG, TIMOTHY A. BERG, RYNE J. LINEHAN, NAYER M. MAHMOUD, and STANLEY E. SMITH, Plaintiffs-Appellants, v. HONEYWELL INTERNATIONAL, INC., and HONEYWELL, INC., Defendants-Appellees.	No. 17.-35083 D.C. No. 3:07-cv-215-SLG MEMORANDUM* (Filed Jul. 3, 2018)

Appeal from the United States District Court
for the District of Alaska
Hon. Sharon L. Gleason, District Judge, Presiding

Argued and Submitted June 11, 2018
Anchorage, Alaska

Before: THOMAS, Chief Judge, and CALLAHAN and BEA, Circuit Judges.

Relators appeal from the district court's grant of summary judgment in favor of Defendant Honeywell International, Inc. ("Honeywell") on their *qui tam* action under the False Claims Act ("FCA"). We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo, *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 329 (9th Cir. 2017), and we affirm.[1]

On this appeal, Relators allege FCA claims based on two categories of alleged false statements: (1) false promises of savings Honeywell calculated upon the "Electrical Baseline Adjustment," and (2) false statements of savings calculated upon the low "infiltration rates" assumed in Honeywell's calculations. "[T]he essential elements of [FCA] liability" are: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006). The district court held that Relators failed to raise triable issues as to the necessary "false statement" and scienter elements. "To survive summary judgment, the relator must establish evidence on which a reasonable jury could find for the plaintiff." *Kelly*, 846 F.3d at 330.

1. The district court did not err in granting summary judgment in favor of Honeywell on Relators' Electrical Baseline Adjustment claim. First, Relators failed to raise a triable issue as to the "false statement" element. As the district court held, "[b]ecause Honeywell disclosed the assumptions and math underlying its estimates, its statements in that regard were not

[1] As the parties are familiar with the facts and procedural history, we restate them only as necessary to explain our decision.

'false' within the meaning of the False Claims Act." At the time Honeywell prepared its proposals, it understood that the government was independently planning to address its electricity needs with a separate "privatization" plan, and, for accounting purposes, the increased electricity costs were to be allocated to *that* project, not to the Honeywell Energy Savings Performance Contract ("ESPC"). Unrebutted evidence establishes that Honeywell therefore never purported to account for Ft. Richardson's increased electricity costs in its savings estimates (because they were factored into the baseline) and that Honeywell provided and explained its inputs, assumptions, and calculations. The scope of Honeywell's statements and the qualifications upon them were sufficiently clear, so that the statements—so qualified—were not objectively false or fraudulent.[2] *See U.S. ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 328 (9th Cir. 1995) (holding statements were "not false" where they "actually disclose[d] what [the relator] claim[ed] they conceal[ed]").

Relators present no evidence to the contrary, but instead argue that Honeywell's statements of energy savings were objectively false because the Electrical Baseline Adjustment was improper under the statutory and regulatory framework that governs ESPCs. But "the statutory phrase 'known to be false' does not

[2] Because we conclude that Honeywell's statements of the energy baseline and the expected savings were not objectively false, we do not decide whether "government knowledge" can serve to "negate" the element of falsity in addition to the element of scienter, as that question is formulated in Relators' Opening Brief.

mean incorrect as a matter of proper accounting methods, it means a lie." *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996). Nor is the FCA "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016). That the Army should have rejected Honeywell's proposals under the ESPC statutes and regulations does not mean that Honeywell's detailed calculations were false.

Second, unrebutted evidence establishes that Honeywell disclosed the "Electrical Baseline Adjustment" and the components of its calculations to the Army. Defendants failed to present any evidence to rebut the inference, based on this "highly relevant" evidence of government knowledge, that Honeywell did not *knowingly* make a false claim. *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Relators rely on the deposition testimony of Honeywell's project manager, Suzanne Wunsch. But the district court correctly found that "no reasonable jury could conclude that [Ms. Wunsch's] statements reflect an admission that Honeywell knew that its baseline, its projected cost, or its 'savings guarantee' were 'false' within the meaning of the FCA."[3]

[3] Relators argue that the district court erred by failing to "seriously question[] whether Wunch's [sic] 'assumptions' regarding privatization were valid, reasonable or ever confirmed by anyone within the government with actual decision-making authority." But this argument "raises questions of contract interpretation rather than false claims." *Butler*, 71 F.3d at 326 ("To the extent that

Thus, Relators failed to raise a triable issue as to scienter.

Finally, "[a] misrepresentation . . . must be material to the Government's payment decision in order to be actionable under the False Claims Act."[4] *Escobar*, 136 S. Ct. at 1996. "[T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive." *Id.* at 2003; *see also Kelly*, 846 F.3d at 334. Indeed, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Escobar*, 136 S. Ct. at 2003. Here, the Army began paying Honeywell's claims in 2003, and continued up to at least 2008, despite being aware of Relators' fraud allegations since 2002, the results of its own audit since 2003, and the problems with the infiltration rates since 2004. Accordingly, Relators also failed to raise a triable issue as to the element of materiality on the "demanding" standard established in *Escobar* and *Kelly.*[5]

[Butler] alleges that . . . those making modifications had no authority to do so, Butler's is a contract dispute.").

[4] The district court did not consider this issue below, but the parties briefed it and this court may affirm on any basis supported in the record. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

[5] Relators attempt to distinguish *Escobar* on the basis that the noncompliance here was not "minor or insubstantial." But *Escobar*'s rule applies to substantial noncompliance (which is not sufficient to establish materiality) "*in addition*" to "insubstantial" noncompliance. *See Escobar*, 136 S. Ct. at 2003 (emphasis added).

2. Nor did the district court err in granting summary judgment in favor of Honeywell on Relators' claim based on the infiltration rates. Where, as here, "the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). There is no evidence here that Honeywell knew its infiltration rates were impossible to achieve at Ft. Richardson. Thus, Relators failed to raise a triable issue as to the required element of scienter.

Relators point to a 2006 statement by Steven Craig, a Honeywell executive, but Mr. Craig's statements show only that Honeywell understood that its infiltration projections depended upon someone (whether the government or Honeywell) undertaking to improve the base's heating system controls and reduce open windows and doors. Relators also submitted the declaration of an expert witness who opined in 2016 that Honeywell made a "conscious and deliberate decision" to use "an extremely low . . . airflow leakage rate." But Honeywell does not dispute that it chose infiltration rates "deliberate[ly]"; the issue is whether Honeywell knew they were impossible to achieve. The expert witness's opinion does not provide more than a scintilla of circumstantial evidence[6] as to that crucial issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

[6] The declarant had no personal or contemporaneous knowledge of Honeywell's state of mind in 2000 because the Army hired the declarant's company to audit the Honeywell project in 2006.

252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff"); *U.S. ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 816–17 (9th Cir. 1995), as amended (May 26, 1995) (finding "no evidence from which a jury could reasonably draw an inference" in an FCA action that the defendant "knowingly presented a false or fraudulent claim" where there was "no direct evidence" and the submitted declaration was ambiguous on that issue).

Furthermore, the government's knowledge also negates scienter as to the infiltration rates.[7] Unrebutted record evidence establishes that Ft. Richardson, the Army, and Honeywell all knew of and agreed to the "aggressive" *(i.e.*, optimistic) rates, and Army officials approved the input variables submitted by Honeywell. Relators failed to rebut this "highly relevant" evidence of government knowledge. *Hagood,* 929 F.2d at 1421.

Finally, for the reasons discussed above, Relators also failed to raise a triable issue as to the element of materiality on the "demanding" standard established in *Escobar,* 136 S. Ct. at 2003, and *Kelly,* 846 F.3d at 334.

AFFIRMED.

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[7] Honeywell raised this argument below, but the district court declined to reach it. However, this court may affirm on any basis supported in the record. *In re Oracle Corp.*, 627 F.3d at 387.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, EX REL, THOMAS A. BERG, TIMOTHY A. BERG, RYNE J. LINEHAN, NAYER M. MAHMOUD, and STANLEY E. SMITH, Plaintiffs, v. HONEYWELL INTERNATIONAL, INC., and Honeywell, Inc., Defendants.	Case No. 3:07-cv-00215-SLG

ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed Dec. 29, 2016)

Before the Court are Defendants' Motion for Summary Judgment at Docket 220 and Relators' Motion for Partial Summary Judgment at Docket 225. The motions have been fully briefed;[1] oral argument was held on October 17, 2016.[2]

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[1] *See* Docket 222 (Defs.' Mem.); Docket 303-1 (Relators' Unredacted Opp.); Docket 258 (Defs.' Reply); Docket 302-1 (Relators' Corrected Mem.); Docket 238 (Defs.' Opp.); Docket 276 (Relators' Corrected Reply). Relators also filed a Notice of Supplemental Authority at Docket 292.

[2] *See* Docket 287 (Hr'g Mins.); Docket 296 (Hr'g Tr.).

This is the third time the Court has addressed dispositive motions in this case. The Ninth Circuit has twice sent this case back to the district court following orders granting motions to dismiss based solely on the allegations pled by Relators.[3] In contrast to the prior motions to dismiss, the motions before the Court at this juncture are motions for summary judgment; the Court's disposition of these motions is based on its review of the extensive submissions of the parties regarding these motions, which consists of thousands of pages of documentary evidence and excerpts from over a dozen depositions.

BACKGROUND

In the late 1990s the Army sought to privatize the utilities at U.S. Army installations.[4] Simultaneously, but as a separate initiative, the Army endeavored to increase the energy efficiency of its buildings and facilities.[5] In 1986, Congress authorized government agencies to enter into Energy Savings Performance Contracts ("ESPC"), whereby the agency could use the savings from an efficiency upgrade to pay for that upgrade.[6] Pursuant to this law, a private contractor would install and maintain Energy Cost Savings Measures ("ECSM"), finance their installation,

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[3] *See* 580 Fed. App'x 559 (9th Cir. 2014); 502 Fed. App'x 674 (9th Cir. 2012).

[4] Docket 319-1 at 4.

[5] Docket 223-18 at 2.

[6] Docket 223-18 at 2; 42 U.S.C. § 8287 *et seq*.

and receive compensation from the government for years into the future based on verified savings from the measures it had installed.[7] By statute, payments to a contractor in a given year cannot exceed "the amount that the agency would have paid for utilities without an [ESPC]" during that year.[8] Federal law also requires that the contract "provide for a guarantee of savings to the agency."[9] It is these types of contracts that underlie this case.

As part of the privatization initiative, beginning in 1999 the Fort Richardson Army base in Anchorage, Alaska ("FRA") contemplated shutting down its central heating and power plant ("CHPP") and instead buying its electricity from a commercial provider.[10] At around the same time, FRA reached out to Honeywell, Inc. to explore options for improving its buildings' energy efficiency.[11] Honeywell had previously entered a contract with the U.S. Army making it the contractor for ESPCs for an extendable five year term.[12] Under that "umbrella" Indefinite-Delivery Indefinite-Quantity contract ("IDIQ"), Honeywell could propose ESPCs that the government could accept by issuing a "Task Order" under the IDIQ.[13] In 2000, Honeywell proposed two

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[7] *See* Docket 223-18 at 2.

[8] 42 U.S.C. § 8287(a)(2)(B).

[9] *Id.*

[10] Docket 319-1 at 4 (Paul Knauff Aug. 21, 2002 Information Paper).

[11] Docket 223-18 at 6 (Col. Mark C. Nelson Mem.).

[12] *See* Docket 225-1 (IDIQ) at 1-3.

[13] Docket 225-1 at 3, 103-04 (ordering clause).

ESPCs—referred to as Proposal #3 and Proposal #4—to improve FRA's energy efficiency.[14] It developed these proposals with the understanding that FRA planned to cease generating its own electricity and would instead buy its electricity from a third-party provider.[15] Honeywell's proposals included estimates of the costs of installation, the current costs of electricity and heating for the base, and the projected costs of electricity and heating after the efficiency measures had been installed and the CHPP shuttered. Honeywell prepared detailed calculations setting out how it arrived at its estimates, which it shared with both FRA personnel and Army Corps of Engineers staff in Huntsville, Alabama.[16]

As the proposals were developed, there were extensive discussions between Honeywell's engineers and the engineers at Huntsville about the basis and reasonableness of certain calculations. Over time, these issues were resolved in multilateral meetings and

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[14] *See* Docket 225-5 (Proposal #3); Docket 265-5 (Proposal #4). The two proposals were similar in their recommended improvements, but each concerned a distinct group of buildings on FRA.

[15] *See* Docket 223-18 at 56 (Nov. 29, 1999 email from Suzanne Wunsch) (inquiring whether FRA intended to close CHPP); Docket 265-10 (Jan. 6, 2000 IST Presentation) at 13 (stating Honeywell's assumption that FRA would "convert from central to distributed heating); Docket 265-12 (Feb. 29, 2000 IST Presentation) at 12 (identifying increased electrical costs from shutting CHPP); Docket 265-12 at 14 (identifying ancillary savings from shutting down CHPP).

[16] *See, e.g.*, Docket 241-30 at 32–36; Docket 223-22 at 4–10; Docket 223-23 at 10–34.

exchanges. Honeywell submitted several revised drafts containing certain amended calculations during the course of these discussions.[17] Ultimately, the Army accepted Honeywell's proposals for FRA in late 2000; Proposal #3 became formalized as Task Order 8 and Proposal #4 became formalized as Task Order 9.[18]

Over the next few years, questions arose as to whether FRA could pay the contract amounts because its actual savings were less than projected.[19] Because the statute authorizing ESPCs limits payments to actual savings, Army lawyers were concerned that making the payments would violate the Anti-Deficiency Act.[20] Honeywell and the government renegotiated and combined the two task orders in 2003.[21] Honeywell received its first payments thereafter, pursuant to the renegotiated contract.[22] After unsuccessfully pursuing internal channels,[23] Relators initiated this action in 2007, alleging that in 2000 Honeywell fraudulently obtained Task Orders 8 and 9. According to Relators, this

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[17] *See, e.g.*, Docket 241-26 at 9–34; Docket 223-2 at 32–35.

[18] Docket 225-2 at 1–3; Docket 225-3 at 1–3.

[19] *See* Docket 319-3 at 2.

[20] *See, e.g.*, Docket 223-38 at 45 (Simmons Mem.). *See* 31 U.S.C. § 1341.

[21] Docket 223-42 at 2–20; *see also* Docket 265-21 (Bridgeman Dep.) at 3. This renegotiated contract is referred to as "Mod II." It combined the two task orders into a single contract. Honeywell and the government had previously modified Task Order 8 to adjust the buildings within its scope. *See* Docket 223-41 at 14 (documenting "modification 01").

[22] *See* Docket 223-45 at 2.

[23] *See, e.g.*, Docket 223-45 at 4–5.

initial fraud also induced the government to enter the 2003 modification and thus, Relators allege, the government's payments pursuant to that modification were fraudulently induced in violation of the FCA.[24]

DISCUSSION

I. Jurisdiction

The Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under the False Claims Act, 31 U.S.C. § 3729 *et seq*.

II. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(a) directs a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The burden of showing the absence of a genuine dispute of material fact initially lies with the moving party.[25] If the moving party meets this burden, the non-moving party must present specific factual evidence demonstrating the existence of a genuine issue of fact.[26] The non-moving party may not rely on mere allegations or denials. Rather, that party must demonstrate that enough evidence supports the alleged

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[24] *See* Docket 1. The operative complaint for purposes of these motions is the Second Amended Complaint (SAC) at Docket 101, filed Aug. 13, 2014.

[25] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[26] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

factual dispute to require a finder of fact to make a determination at trial between the parties' differing versions of the truth.[27]

When considering a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party and draws "all justifiable inferences" in the non-moving party's favor.[28] When faced with cross-motions for summary judgment, the court "review[s] each separately, giving the non-movant for each motion the benefit of all reasonable inferences."[29] To reach the level of a genuine dispute, the evidence must be such "that a reasonable jury could return a verdict for the non-moving party."[30] If the evidence provided by the non-moving party is "merely colorable" or "not significantly probative," summary judgment is appropriate.[31]

To prevail on summary judgment, Relators must show that there is no genuine dispute of material fact as to each element of their claim and that they are entitled to judgment as a matter of law based on those

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[27] *Id.* (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

[28] *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

[29] *Flores v. City of San Gabriel*, 824 F.3d 890, 897 (9th Cir. 2016) (citing *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 786 (9th Cir. 2008)).

[30] *Anderson*, 477 U.S. at 248.

[31] *Id.* at 249.

undisputed facts.[32] But for Honeywell to prevail, it must show only that there is no genuine dispute as to any material fact with regard to any one element of each of Relators' claims, and that it is entitled to judgment as a matter of law on that element. And because Relators bear the burden of proof at trial, Honeywell may prevail at summary judgment if it shows that "there is an absence of evidence to support [Relators'] case."[33] If Honeywell meets that burden, the burden then shifts to Relators "to designate specific facts demonstrating the existence of genuine issues for trial."[34] For that reason, the Court will first address Honeywell's motion; for if Honeywell can show that Relators lack evidence to prove any one element of each of their claims even when adopting all justifiable inferences in favor of Relators, then Relators' motion necessarily fails.

III. Summary of Claims

This case arises in the context of a complex statutory, regulatory, and contractual framework. For clarity, the Court will summarize Relators' theories before addressing the pending motions.

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[32] Plaintiffs do not seek summary judgment on damages, but damages are not an element of an FCA claim. *See United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 152–53 & n.5 (1956)).

[33] *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

[34] *Id.*

Relators seek to impose FCA liability based on a fraud-in-the-inducement theory.[35] Such a claim requires a showing that (1) Honeywell made a promise to the government that was false when made; (2) Honeywell knew the promise was false when made; (3) Honeywell's promise was material to the government's decision to award Honeywell the ESPCs at FRA in 2000, and the subsequent modification in 2003; and (4) there was a request for the government to pay out money or forfeit money due.[36] Relators' basic claim is that in 2000 Honeywell promised the Army that it would produce certain savings through the ESPCs, that these savings promises were false, and that Honeywell knew they were false at the time the promises were made.[37] Relators then contend that Honeywell knew that once the promised savings failed to materialize the government would renegotiate the contracts rather than pay the roughly $50 million termination fee, and that thus the payments under the renegotiated contract were induced by the original fraud.[38]

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[35] *See* Docket 101 (SAC) at ¶¶ 1–3; Docket 225 at 37 ("Relators' claims are grounded on a fraud in the inducement theory of liability").

[36] *See United States ex rel. Hendow v Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006).

[37] *See* Docket 101 (Second Amended Complaint ("SAC")) at ¶¶ 43, 74; Docket 302-1 (Relators' Mot.) at 2 ("Honeywell obtained [the contracts] . . . through a materially false guarantee of cost-of-energy savings. . . .").

[38] *See* Docket 303-1 (Relators' Unredacted Opp.) at 45.

As Relators themselves explain, the "savings guarantee" is derived from an equation.[39] The task orders disclose that the equation, calculations, and data underlying the "savings" guarantee are provided in the "back-up data."[40] In essence, the "savings guarantee," as reported in the task orders, was the difference between the "baseline" and the projected future costs: the "A" in A = B – C. Relators' argument is that the baseline "B" was false, and that the projected costs "C" was false, and that Honeywell knew this to be so. Relators have alleged four different falsehoods in support of their claim that Honeywell artificially inflated the baseline costs and artificially deflated post-project costs.[41]

First, Relators assert that Honeywell "added future non-actual costs of electricity to the baseline"[42] and that Honeywell "improperly use[d] the future commercial cost of purchasing electricity as the pre-contract/

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[39] *See* Docket 303-1 at 27–28.

[40] Docket 225-2 at 9 (Task Order 8); Docket 225-3 at 9 (Task Order 9). Honeywell's 30(b)(6) witness testified that the "back-up data" referred to the proposals. *See* Docket 265-19 (Rogan Dep.) at 3.

[41] Relators' SAC contains additional allegations of improper baseline and costs calculations, *see, e.g.*, Docket 101 at ¶ 25 (allegations of false weather data), but they have not advanced those allegations at this stage in the proceedings. In their opposition to Honeywell's motion, Relators revive one allegation made in the SAC that was not raised in their own motion: that Honeywell misled the government as to the contract's legality. *See* Docket 101 at ¶ 72; Docket 303-1 (Relators' Opp.) at 13. That claim is discussed *infra*, section V.B.

[42] Docket 101 at ¶ 33.

pre-project cost of electricity energy baseline."[43] As discussed at greater length below, Honeywell calculated the baseline as if FRA had already begun purchasing electricity commercially, even though the CHPP had not yet shut down when the proposals were drafted and the task orders issued in 2000.

Second, Relators now claim in their summary judgment briefing (although so far as the Court can discern, this allegation does not appear in their Second Amended Complaint ("SAC")), that the "cost of energy savings guarantee [in the task orders] is demonstrably false as it excludes, for the post-project heat costs, the post-project/post-contract condition heat load costs for process loads and domestic hot water."[44]

Third, Relators contend that Honeywell's "proposal documents knowingly and fraudulently and falsely represented that normal Department of Energy infiltration factors had been used," but Honeywell had instead used an infiltration value that was "only two thirds of the 'tight' construction value." Relators maintain that the use of the wrong infiltration value resulted in "a significant understatement of defendants' post-project infiltration heat load requirement and grossly inflated energy savings."[45]

Fourth, Relators claim that Honeywell "failed to allow for adjustment of the baseline for buildings that

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[43] Docket 302-1 at 3.

[44] Docket 225 at 4.

[45] Docket 101 at ¶ 24; Docket 302-1 at 4; *see also* Docket 101 at ¶ 79(A).

were to be demolished" and that this resulted in an improper allocation of savings between Phase 1 and Phase 2 of the project.[46]

Defendants argue that Relators have not and cannot produce any evidence that Honeywell "knowingly" made any false statements to the government, and that therefore Honeywell is entitled to summary judgment.[47] With regard to the particular assertions of allegedly false statements, Honeywell contends that Relators' claims fail for the independent reason that Honeywell fully disclosed all of the relevant facts and assumptions in its proposals to the government. The Court will address each of Relator's four specific allegations in turn, but will first address the legal significance of the government's knowledge of Honeywell's calculations and data inputs in this False Claims Act proceeding.

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[46] Docket 302-1 at 4; *see also* Docket 101 at ¶ 79(D). The project was divided into two phases. *See* Docket 223-22 at 6. "Phase 1" was "Proposal #3" and became Task Order 8. "Phase 2" was "Proposal #4" and became Task Order 9.

[47] *See* Docket 222 at 33–34.

IV. The Government Knowledge "Defense"[48]

Honeywell contends that one reason Relators cannot prevail in this action is because Honeywell indisputably made extensive disclosures to the government about its underlying calculations and data inputs. Honeywell argues that because of these disclosures, Relators cannot show that Honeywell made knowingly false statements to the government.[49] According to Honeywell, the government's "knowledge of the facts underlying the alleged fraud negates the elements of knowledge and falsity."[50] Relators first counter that government knowledge "is irrelevant because Honeywell has admitted that it actually knew there would be no savings before it submitted the two false task order savings guarantees."[51] Relators also argue that "Honeywell failed to make full disclosure of the

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[48] The Ninth Circuit rejected Honeywell's efforts to assert a government knowledge defense at the motion to dismiss stage, noting that "[t]he possibility that Honeywell may prevail at a later stage of this litigation under the so-called government knowledge defense to FCA liability does not support the conclusion that the Relators' complaint cannot be saved by an amendment. . . . [That 'defense'] is therefore appropriate 'at the summary judgment stage or after trial.'" *Berg v. Honeywell Int'l, Inc.*, 580 Fed. App'x 559, 560 (9th Cir. 2014) (quoting *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327 (9th Cir. 1995)). As the proceedings have now advanced to summary judgment, it is now appropriate to consider the government knowledge "defense" and the extensive evidence in the record related to that defense.

[49] *See* Docket 222 at 36–37.

[50] Docket 258 at 10.

[51] Docket 303-1 at 33.

relevant information to the relevant government officials."[52]

The Court rejects the premise underlying Relators' first argument as unsupported by the record. There is no evidence in the record to support Relators' assertion that Honeywell knew there would be no savings from its proposed ECSMs. That assertion rests on the deposition testimony of Suzanne Wunsch, a Honeywell employee involved in the contract negotiations with the government in 2000.[53] Although Ms. Wunsch did testify that "everyone knew" that "it would cost the government more for heat and electricity after the plant was closed than it was before,"[54] she also said that was exactly what Honeywell told the government: "[T]hese slides show the government that although there will be savings generated, they will be paying more when they close the plant."[55] This second statement underscores the fact that Ms. Wunsch understood Honeywell's "savings guarantee" to be based on assumed parameters—one of which was that as a result of the CHPP closure FRA was going to pay more for electricity whether or not it accepted Honeywell's proposed ESPCs. Accordingly, Ms. Wunsch testified that Honeywell was "directed" to show the Army "what will

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[52] Docket 303-1 at 37.

[53] *See* Docket 302-1 (Relators' Mot.) at 18. Ms. Wunsch now goes by Ms. Johnson, but consistent with the documents in evidence and the parties' briefing, the Court will refer to her as Ms. Wunsch.

[54] *See* Docket 265-18 (Wunsch Dep.) at 5.

[55] Docket 265-18 at 4.

it look like when the plant is closed."[56] These statements reflect Ms. Wunsch's belief that both Honeywell and the government were well aware that the privatization of FRA's electricity supply would have a negative impact on FRA's electricity costs. Ms. Wunsch's comment reflects her understanding that Honeywell's proposals were distinct from, and yet incorporated, FRA's plans to privatize its electricity supply. Honeywell's calculations of savings was determined within the context of FRA's independent plan to buy electricity from a commercial source.[57] No reasonable jury could conclude that her statements reflect an admission that Honeywell knew that its baseline, its projected costs, or its "savings guarantee" were "false" within the meaning of the FCA.

Plaintiffs correctly observe that the Ninth Circuit has held that the fact that the "relevant government officials know of [a statement's] falsity is not in itself a defense."[58] But the Ninth Circuit has also repeatedly recognized that "knowledge possessed by officials of the United States may be highly relevant" at trial or at the summary judgment stage.[59] Government

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[56] Docket 265-18 at 4. There is a dispute as to whether the Army actually directed Honeywell to make such an assumption, but as explained below, that dispute is immaterial. *See infra* note 96

[57] *See infra* note 99 and sources cited therein.

[58] *See United States ex rel. Hagood v. Sonoma Cnty. Water Agency* (*Hagood I*), 929 F.2d 1416, 1421 (9th Cir. 1991) (citing *United States v. Ehrlich*, 643 F.2d 634, 638–39 (9th Cir. 1981)).

[59] *Id.* at 1421.

knowledge may be "highly relevant" to two elements of an FCA claim.

First, government knowledge may be used to rebut the necessary scienter: If the contractor "so completely cooperated and shared all information" with the government, then the contractor "did not 'knowingly' submit false claims."[60] In *United States ex rel. Butler v. Hughes Helicopters*, the relator alleged that the contractor selling helicopters to the Army had falsely certified compliance with agreed-upon testing parameters. The contract called for certain testing procedures, but prior to testing the contractor "prepared Test Plans for the Army's approval" that "did not include all of the testing referred to in the contract documents."[61] The Army's technical representatives nonetheless recommended approval of the test plans, and the contracting officers signed off on them, apparently in recognition that less extensive testing was warranted "because of [the Army's] decision to speed up production."[62] When the contractor delivered the helicopters, it signed forms "which stated that the helicopters conformed to contract."[63] In affirming a directed verdict for the defendant–contractor on the

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[60] *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327 (9th Cir. 1995); *see also Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012); *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1995), *abrogated on other grounds, United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015).

[61] *Butler*, 71 F.3d at 324.

[62] *Id.*

[63] *Id.*

relator's FCA claims, the Ninth Circuit assumed that the contractor's statements were "false,"[64] but nonetheless concluded that the extent of the government's knowledge negated a finding that there had been a "knowing" submission of a false claim. As one example in that case, the contractor had represented that "pattern tests of the pilot's radio were done at 10 to 12 nautical miles," but they had actually been done at closer distances. As to that example, the Ninth Circuit held that because "the Army knew that the summary statement of the distances at which the pattern tests were conducted was not strictly accurate as to all the tests," and because "this discrepancy was the subject of dialogue between the Army and MDHC" the "only reasonable conclusion is that this was not a 'knowingly' false statement, as the noncomplying tests were known to and approved by the Army."[65]

Similarly, in *Hooper v. Lockheed Martin Corp.*, the relator alleged that the contractor had used "defective testing procedures."[66] The district court granted summary judgment to the contractor after concluding "that there was no evidence of fraud in the testing because the Air Force was aware of and approved Lockheed's testing methods, even if the tests were not done in the order specified in the contracts."[67] The Ninth Circuit affirmed, holding that "where Lockheed submitted

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[64] *Id.* at 327.

[65] *Id.* at 328.

[66] 688 F.3d 1037, 1050 (9th Cir. 2012).

[67] *Id.* at 1050–51.

overwhelming evidence that it . . . disclosed to the Air Force its testing procedures," the FCA claim necessarily fails because the relator could not show that "Lockheed 'knowingly' submitted a false claim."[68] Thus, Ninth Circuit authority establishes that the fact that a contractor has been open and candid with the government about the facts underlying its statements to the government can be used to show that the contractor did not have the requisite scienter.

Second, government knowledge may "show that the contract has been modified or that its intent has been clarified, and therefore that the claim submitted by the contractor was not 'false.' "[69] As the Seventh Circuit has stated, "[i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA."[70] In this context, government knowledge is used not to rebut an inference of scienter, but rather to define the scope of the statement which is alleged to be false.

Several district courts have taken the same view, recognizing that the context of a statement can negate

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[68] *Id.* at 1051.

[69] *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993).

[70] *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999); *see also United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952 n.19 (10th Cir. 2008).

its apparent falsity. Thus, the district court in *Butler* found that the relator "did not provide legally sufficient evidence that, given the nature of the relationship between [the contractor] and the Army, any statements or claims made by [the contractor] were 'false or fraudulent.'"[71] And in *Boisjoly v. Morton Thiokol, Inc.*, the district court examined the "close interplay" between the contractor and the government, and concluded that, given the government's detailed knowledge of the very defects that the relator alleged gave rise to an FCA claim, the relator could not prove "the element of falsity or fraud required."[72]

In affirming the district court's directed verdict in *Butler*, the Ninth Circuit applied this same logic. In that case, the contractor had submitted a report that concluded that the helicopter radios "have been successfully demonstrated and are ready for production." But in fact the radios had failed to meet certain contractual specifications. The Ninth Circuit held that because "the failure to meet specifications was detailed elsewhere in the report," the "generalized statement with added details was not the type of [false] representation required by the statute."[73] Thus, the additional details provided in the report warranted the directed

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[71] 1993 WL 841192 at *14 (C.D. Cal. Aug. 25, 1993) (granting directed verdict for defendant), *aff'd* 71 F.3d 321 (9th Cir. 1995).

[72] 706 F. Supp. 795, 809–10 (D. Utah 1988). *Boisjoly* arose in the context of a motion to dismiss. While the Ninth Circuit has rejected attempts to employ government knowledge at that stage, it has characterized *Boisjoly* as "defensible on its facts." *Hagood I*, 929 F.2d at 1421.

[73] *Butler*, 71 F.3d at 328.

verdict for the contractor despite the conclusion's guarantees because no reasonable jury could conclude that a false statement had been made.

Honeywell maintains that the government's knowledge in this case is relevant for both of the reasons discussed above. It contends that its open and collaborative discussions with government officials and the wide-ranging disclosures prior to the finalizing of the task orders defeat any claim that Honeywell knowingly made any false statement. And Honeywell claims that its wide-ranging disclosures negate any claim that its statements were false.[74] The Court will address the applicability of the government's knowledge in each of these two contexts for each of the Relators' specific claims as necessary.

V. Specific Claims

A. Baseline Inclusion of Future Non-Actual Costs of Electricity

Both the parties principally focus on Relators' first claim: that Honeywell misrepresented projected savings by assessing the baseline as though FRA were already purchasing electricity on the commercial market.[75] The timing of the knowledge is critical: an FCA claim requires a false statement that is known to be

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[74] *See* Docket 258 at 10.

[75] *See, e.g.*, Docket 222 (Honeywell's Mem.) at 13–18; Docket 302-1 (Relators' Mem.) at 9–14.

false at the time the statement is made.[76] Thus, for the asserted savings to be an actionable claim that survives summary judgment, there must be some evidence that Honeywell knew in 2000 that the savings it was projecting were inaccurate.[77]

But Relators have not presented any evidence that Honeywell possessed such knowledge at the time of the initial contracting in 2000. As discussed above, Ms. Wunsch's statement that "everyone knew" that shutting down the CHPP would increase electricity costs does not establish that Honeywell knew its baseline was improper.[78] And Honeywell executive Steve Craig's statement in 2006 that Honeywell knew "from the very beginning" that the project would not save energy[79] was wholly unrelated to the accuracy of the baseline.[80] As discussed in greater detail below, Mr. Craig's statement, in its full context and drawing all *reasonable* inferences in Relators' favor, was not that Honeywell

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[76] *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006) (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)).

[77] Some evidence suggests that there actually were substantial energy savings as a result of the ESPCs. *See, e.g.*, Docket 223-50 at 21–23 (Simmons June 27, 2008 Mem.). But whether savings were in fact realized from the project does not impact whether there was fraud in the inducement, and the Court need not decide the issue.

[78] *See supra* section IV.

[79] *See* Docket 53-1 (Berg Decl.) at 22, ¶ 44.

[80] *See* Docket 259-1 at 94 (Berg Dep.) ("As far as I know, as far as I can recollect, the telephone conference centered on heating and not on electrical.").

knew there would not be any savings as a result of its energy savings measures, but rather that Honeywell knew there would not be any savings if certain actions were not taken to improve infiltration rates.[81] Finally, Relators suggest that Honeywell's expertise in ESPC contracts warrants an inference that it "knew" its baseline was "improper."[82] But Honeywell's expertise is not sufficient evidence to establish knowing fraud under the False Claims Act.[83]

Moreover, in this case Honeywell did not simply present a conclusory savings number to the government. Rather, Honeywell provided extensive calculations to the government supporting its projected savings; and the government, after substantial discussion with Honeywell, approved those calculations. The Court has reconstructed the following approximation of these calculations from the proposal documents:

First, Honeywell assessed FRA's energy usage based on fiscal years 1998 and 1999.[84] At that time, most of FRA's heat and electricity was being provided by the CHPP. The CHPP was a cogeneration plant, meaning that it burned fuel to produce steam; the steam first turned turbines to generate electricity and was then

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[81] *See infra* section V.C.

[82] *See, e.g.*, Docket 302-1 at 15–16, 21–22.

[83] *Cf. Hopper*, 91 F.3d at 1268 ("Hopper argues that past regulatory noncompliance creates an inference that the School District lied when certifying future compliance. This is not sufficient evidence to establish knowing fraud under the [False Claims] Act.").

[84] *See, e.g.*, Docket 265-5 at 39.

routed throughout the base to heat the buildings. Honeywell then calculated the total cost of fuel to produce all of the steam.[85] In consultation with Army personnel, Honeywell allocated the cost of generating the steam between electricity generation and heat production.[86] This provided a cost for heat and a separate cost for electricity.[87]

Honeywell's proposals for Task Orders 8 and 9 each contained two proposed Energy Cost Savings Measures (ECSMs). First, Honeywell would install high-efficiency natural gas furnaces in each building and eliminate reliance on the CHPP for heating.[88] Honeywell estimated the cost of heating the buildings using the new furnaces, and presented the energy savings from that ECSM as the difference between that cost and the portion of steam costs that Honeywell had allocated to heating the buildings using the CHPP.[89] Second, Honeywell proposed installing "building management and control systems" that accounted for building occupancy

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[85] *See* Docket 265-5 at 150 (Proposal #4).

[86] This percentage varied throughout the various proposals, apparently based on input from FRA employees. *See* Docket 265-5 at 147 ("Plant Steam to Heating was recalculated using the formula provided by DPW").

[87] In Proposal #4, Honeywell estimated this cost at $2,300,582 per year for electricity and at $2,214,681 for heat. Docket 265-5 at 150–51. In Proposal #3, Honeywell had estimated $2,329,158 for electricity and $2,288,850 for heat. Docket 223-22 at 6.

[88] Docket 265-2 at 23 (Proposal #3).

[89] *See* Docket 265-2 at 27. The project was divided into two phases, with one-half of the heat costs assigned to each phase. *See* Docket 223-22 at 6.

by reducing heat supply during off-peak hours and optimized hot water systems.[90] For these measures, Honeywell used computer modeling software to project the energy consumption for each building with and without the control measures.[91] The reported energy savings was the difference between those two numbers. Combined, these two ECSMs were expected to produce $464,239 in annual heat energy savings for Task Order 8 and $580,689 for Task Order 9.[92]

Thus, the savings that Honeywell presented were the results of the underlying calculations it disclosed:

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[90] *See* Docket 223-20 at 161.

[91] Docket 223-20 at 163.

[92] *See* Docket 225-2 (Task Order 8) at 9; Docket 225-3 (Task Order 9) at 9. Task Order 8's savings are the sum of the savings from each proposed ECSM, $235,709 for the first, Docket 223-20 at 28, and $228,530 for the second, Docket 223-20 at 164. Task Order 9's savings are the sum of the savings from each ECSM, $522,941 for the first, Docket 265-5 at 54, and $57,748 for the second, Docket 223-26 at 46. Task Order 9 included additional "electric savings" of $245,681. Honeywell disclosed these savings separately, and reported that "These savings are a result of a phone conversation with Mr. Paul Knauff [an FRA employee] on November 8, 2000." Docket 265-5 at 54; *see also* Docket 265-5 at 153 (explaining the calculations for these savings). This item of the savings calculation is not directly at issue in this case, though it is discussed in more detail below. The total savings projected for Task Order 9 was the sum of these three numbers, $826,370. There is a $2,000 discrepancy in the projected savings in the issued task order, *see* Docket 225-3 at 9 (estimating $828,370), but that discrepancy may be the result of an amendment to the estimated savings from the second ECSM: The estimates for the first were updated at some point, *compare* Docket 223-25 at 5, *with* Docket 265-5 at 54, but the Court was unable to locate in the record any corresponding update for the second ECSM estimates.

the difference between the cost associated with heating the buildings using the CHPP and the cost to heat the buildings after the CHPP was shut down. Honeywell was transparent about how it reached its numbers.

Of course, there was an additional consequence to shutting down the CHPP. Once the CHPP was shut down, FRA would need to purchase electricity from another source. Relators' claim is that Honeywell's projected savings number was "false" because Honeywell "improperly us[ed] the future commercial cost of purchasing electricity as the pre-contract/pre-project cost of electricity energy baseline."[93] Relators point to Honeywell's "Fuel Sensitivity Analysis," a spreadsheet that shows the dollar value of the *heat* savings projected for Task Order 8, which is identical to the dollar value of the *total* savings projected in Task Order 8.[94] According to Relators, this "conclusively proves that for the cost of energy savings in Task Order 8 . . . Honeywell only conducted a cost of energy savings regarding heat."[95] In essence, Relators argue that Honeywell should have deducted the increased costs of purchasing electricity from any energy savings number. Honeywell does not dispute the contention that Task Order 8 contained only heat savings, but instead counters that it was transparent not only with regard to how it calculated savings, which looked only at heat costs, but also with

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[93] Docket 302-1 at 3.

[94] *Compare* Docket 265-1 (Fuel Sensitivity Analysis) at 1, *with* Docket 225-2 (Task Order 8) at 9.

[95] Docket 302-1 at 35.

regard to the fact that it was not including the increased costs of electricity.[96]

As Honeywell disclosed during a presentation with Army staff in February 2000 (several months before the task orders were issued), purchasing electricity commercially would cost more money than producing it at the CHPP. In that presentation, Honeywell indicated that the then-current costs associated with generating electricity at the CHPP were $3,652,591 per year, and that the cost to buy the same amount of electricity commercially would be $4,544,027 per year. In

[96] Relators identify a genuine dispute of fact as to whether Paul Knauff, an FRA employee, instructed Honeywell to account for the increased costs of electricity in this matter. *See* Docket 241 (Relators' Opp.) at 18–19; Docket 241-5 (Knauff Dep.) at 3. Paul Knauff's own deposition testimony directly contradicts Honeywell's 30(b)(6) witness, Richard Rogan. *See* Docket 241-1 (Rogan Dep.) at 2–3. Separate evidence might also support Honeywell's version of events if this case went to trial: an Army Audit Agency interview from 2003 indicates that Paul Knauff recalled that "electricity was never included in the project" and that "Honeywell briefed that information upfront when the project first started." Docket 319-2 at 5. But this statement is ambiguous as to what it meant that "electricity was never included," and the Court assumes, as it must for purposes of this motion, that Mr. Knauff was not referring to the baseline. While such an instruction would have bolstered Honeywell's reliance on the government knowledge to defeat Relators' claims, it is not necessary to it. The Court assumes for purposes of this motion that Mr. Knauff did not so instruct Honeywell, but the fact turns out to be immaterial: As the discussion in this section shows, Honeywell's repeated disclosures informed the government exactly how Honeywell was calculating the baseline and the savings, and so its reason for doing so in the first instance does not affect whether its baseline was "false" or whether any falsity was known to Honeywell at the time.

bold letters at the bottom of that slide, Honeywell indicated "Net Electric Cost Increase $891,437."[97] And on the next slide, Honeywell showed how it intended to calculate the "Baseline Energy Costs." The baseline would include the total energy costs associated with running the CHPP in the past, the projected increase in costs when electricity was purchased, and the additional costs of the electricity that FRA was already purchasing. This gave the "Total Annual Baseline Energy Costs" of $8,378,738.[98] Thus, in February 2000, over six months before the first contract was formalized, Honeywell was clearly including the increased electrical costs of purchasing electricity in its electricity baseline, thereby indicating to the government that its energy savings calculations would not account for those increased costs.[99]

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[97] Docket 265-12 at 12 (Feb. 29, 2000 IST Meeting Powerpoint).

[98] Docket 265-12 at 13.

[99] As a consequence of this adjustment, the baseline was calculated as if FRA had stopped using the CHPP to produce electricity, but was still using it to produce heat. Thus, the ESPCs could account for the ancillary savings from shutting down the CHPP, such as avoided labor and maintenance costs, even though it did not account for the increased cost of electricity. Honeywell may have concluded that FRA was planning exactly this, since the privatization efforts were distinct from the ESPC. *See* Docket 225-8 (AAA Lessons Learned) at 13 (noting that FRA personnel "were under the impression the Army was getting out of the utility business, no matter what the cost, whether by privatizing or by the use of [ESPCs]"); Docket 223-41 at 7 (Charles Baus March 29, 2000 email) (discussing electrical privatization); Docket 223-38 at 44 (Simmons April 10, 2003 Mem.) ("USARAK [U.S. Army, Alaska] was proceeding with the understanding that the electrical system

When Honeywell submitted its formal proposals in July 2000 (Proposal #3) and November 2000 (Proposal #4), it again indicated that the electricity baseline would be "adjusted" to account for the increased costs of purchasing electricity. Honeywell first calculated, "per the monthly plant operating reports," the CHPP's electrical production in megawatt-hours per year. It then added the electricity that FRA was currently purchasing to estimate CHPP's total electricity requirement. Then, under the bolded subtitle "Electrical Baseline Adjustment," Honeywell calculated how much it would cost to purchase the same amount of electricity commercially.[100]

The record also demonstrates that Honeywell knew that the government also knew about the electrical baseline adjustment. As part of the ESPC process, Honeywell submitted its calculations to the Army Corps of Engineers for review and approval. Tim Brown, one of the Army engineers reviewing the proposal documents, specifically commented to Honeywell with regard to the Electrical Baseline Adjustment that "[t]he analysis should include supportive information to demonstrate the actual electrical charges after the CH&PP is shut down."[101]

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was going to be privatized."); Docket 319-2 at 2 ("At the time the project started, it was understood that electricity was to be purchased."); Docket 319-2 at 6 ("The intent of the ESPC was not to replace the power plant, but to replace the steam distribution system.").

[100] Docket 265-5 at 42; *see also* 225-5 at 5.

[101] Docket 223-2 at 33–34.

Relators argue that other parts of Honeywell's savings calculations show that it was misleading the government with regard to how it calculated the electricity costs. They note that one component of the savings guarantee for Task Order 9 was the "electrical savings" from shutting down the CHPP: The CHPP itself required electricity to power lights and various mechanical components in the CHPP building, and shutting it down would eliminate those requirements, reducing FRA's total electricity demand.[102] In evaluating these savings, Honeywell used the then-current costs to provide that electricity—the cost of generating the electricity using the CHPP—instead of the projected commercial rate. Relators argue that this fact demonstrates that the government believed baseline costs would be calculated using the CHPP's cost-to-generate, rather than the commercial cost-to-buy.[103] But the parties do not dispute that this specific component of the proposal was added at the behest of Paul Knauff, an FRA employee.[104] Thus, whichever rate should have been used for this calculation, the fact that the Army personnel requested use of the CHPP's cost-to-generate rate negates Relators' assertion that

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[102] *See supra* note 92. This component is not directly at issue, and is distinct from the electrical baseline adjustment.

[103] *See* Docket 302-1 at 13.

[104] *See* Docket 265-5 at 54; *see also* Docket 265-5 at 153 (explaining the calculations for these savings). *Cf. supra* note 96 (detailing a dispute regarding a different instruction Honeywell contends Paul Knauff gave).

Honeywell made a knowingly false statement to the government when it incorporated this request.

The Court agrees with Honeywell that, as a matter of law, its extensive disclosures to the government prior to the task orders' finalization preclude Relators' FCA claim.[105] First, the stated energy savings were clearly calculated and identified as heat energy savings only. Those numbers did not become "false" merely because they excluded electricity costs.[106] The savings estimates were the result of clearly disclosed mathematical equations that did not even purport to include electricity costs. Because Honeywell disclosed the assumptions and math underlying its estimates, its statements in that regard were not "false" within the meaning of the False Claims Act.[107]

Moreover, Honeywell's repeated disclosures to the government about the "Electrical Baseline Adjustment" preclude a finding that any statement in that

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[105] Relators have focused substantial briefing on whether the baseline was permissible or proper under the applicable statutes and regulations. But FCA liability does not attach to mere regulatory violations. *See United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006). Thus, the Court need not decide whether or not the applicable regulations allowed an ESPC to account for the electricity costs in the manner these ones did. *See also infra* Part IV.

[106] Relators also argue that these numbers were inaccurate for other distinct reasons. The Court addresses these allegations in the pages below.

[107] *Cf. United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 328 (9th Cir. 1995) (holding that "a generalized statement with added details was not the type of representation required by the statute").

regard was known to be false by Honeywell when made.[108] Honeywell informed the government that it would cost more to buy electricity than to produce it. It disclosed the basis for its energy savings calculations which clearly did not account for the increased electricity costs. It communicated the electrical baseline adjustment to the government in both its formal proposals and in its less formal presentations. It received comments from government employees about its adjustment calculations. Honeywell "completely cooperated and shared all information" with the government, and thus "the Army knew" that the increased electrical costs were not accounted for and this fact "was the subject of dialogue between the Army and [Honeywell]." Therefore, the "only reasonable conclusion is that this was not a 'knowingly' false statement, as the [calculations] were known to and approved by the Army."[109]

In light of the lack of evidence that Honeywell had any knowledge that the baseline was improper, and in light of the overwhelming evidence that Honeywell fully disclosed the baseline adjustment and the fact that its energy savings calculations did not account for the increased costs of electricity, the Court finds that

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[108] Contemporaneous emails between Honeywell employees also rebut any suggestion that Honeywell "knew" the baseline to be "false." In March 2000, Honeywell's Charles Baus emailed other Honeywell employees working on the FRA project, and stated that "we will be using the MLP Rate #760 to determine the baseline electric rate. Again, the philosophy being that the electric system 'privatization' is proceeding without us and this is what they will be paying." Docket 223-41 at 7.

[109] *Butler*, 71 F.3d at 327–28.

there is no genuine dispute as to any material fact with regard to either the "falsity" of Honeywell's savings estimates or Honeywell's knowledge of any alleged falsity. Accordingly, Honeywell is entitled to judgment as a matter of law on this claim. FCA liability cannot be premised on Honeywell's electrical baseline adjustment.

B. Heat Costs

Relators assert that Honeywell "improperly omitted the process loads and domestic hot water loads from the post-project heat costs."[110] Honeywell responds that the omission of process loads "was fully disclosed to the Government in the proposal documents."[111] But whether or not Honeywell fully disclosed this omission, Relators have not answered Honeywell's assertion that there is no evidence that the omission was made "knowingly." While Relators present evidence to demonstrate that these numbers were omitted,[112] Relators offer only

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[110] Docket 302-1 at 23.

[111] Docket 238 at 29.

[112] *See, e.g.*, Docket 302-1 at 38. The extent to which such an omission was wrongful is disputed. *Compare* Docket 238 (Honeywell Opp.) at 29 ("Relators' own expert agrees . . . that ESPC baseline calculations should never include process loads."), *with* Docket 302-1 at 36 (arguing that "Honeywell dropped the post-retrofit domestic hot water and process loads" in an attempt "to yield the false energy savings guarantee").

a bare unsupported assertion that this omission was intentional.[113]

Relators suggest that Honeywell can be charged with "knowingly" submitting false claims because it failed to use due diligence to verify its submissions. But this argument fails for two reasons. First, Relators have not proffered any evidence that Honeywell did not use due diligence; they do not discuss at all what processes Honeywell used (or did not use) to verify the submissions. They only repeatedly state what they view as mistakes in Honeywell's calculations. But if the fact of a mistake was sufficient to charge a sophisticated contractor with knowledge of that mistake, then the "knowingly" element of the False Claims Act would be vitiated entirely: every mistake that a contractor made in submitting claims would be transformed into a lie. This is plainly not the law, as "the common failings of engineers and other scientists are not culpable under the Act."[114]

Second, and more fundamentally, Relators' argument rests on an apparent misreading of *United States v. United Health Insurance Company.*[115] In that case,

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[113] *See* Docket 302-1 at 39 ("Honeywell's various and creative methods in cherry-picking values and strategically inserting or deleting them from baseline calculations was conscious and deliberate.").

[114] *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995) (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992)).

[115] *See* Docket 302-1 at 39 (citing *United States v. United Health Insurance Co.*, 2016 WL 7378731 at *2 (9th Cir. Aug. 10, 2016), *as amended on denial of r'hrg en banc*).

health insurers participated in a government program that paid the insurers a certain amount for each insured, based on the assessed "risk" associated with that patient. Because that risk—and accordingly the amount paid—was based on the number and types of diagnoses for each patient, an insurer received more money from the government for "sicker" patients than for healthier ones. The insurers allegedly implemented an internal program whereby they verified the diagnosis codes entered for each patient, but only corrected the codes when they had understated the diagnosis, and ignored diagnosing errors that overstated a patient's diagnosis. Over time, the insurers' patients appeared much sicker than they actually were, because only underdiagnoses were being corrected.[116]

In reversing a district court's grant of the health insurers' motion to dismiss, the Ninth Circuit concluded that the alleged "one-sided retrospective review" was not a good faith attempt to verify the accuracy of the diagnosis codes, and thus, if the allegations were true, the insurers had falsely certified to the government that its submissions were "accurate, complete and truthful" based on the "best knowledge, information, and belief" of the insurers.[117] But the relevant regulations did not require the insurers to implement a retrospective review at all; they merely required that, if the insurers did implement a retrospective review, it

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[116] *See* 2016 WL 7378731 at *2.

[117] *United Healthcare*, 2016 WL 7378731 at *9.

be carried out in good faith.[118] And so the only requirement that *United Health Insurance* imposes is that if a contractor implements a submittal review process, it may not review their submittals in bad faith.

Here, Relators have not produced any evidence from which a jury could reasonably infer that Honeywell had implemented a one-sided review that was designed to correct only certain errors. Even assuming that the omission of the process and hot-water loads was an error, the fact that an error occurred, standing alone, does not establish that Honeywell "knowingly" committed the error, even under a "reckless disregard" standard. Honeywell has met its burden of "showing . . . that there is an absence of evidence to support [Relators'] case," and it is accordingly entitled to judgment as a matter of law on this claim.[119]

C. Infiltration Rates[120]

Relators alleged in their SAC that Honeywell "deliberately overwrote" software distributed by the Department of Energy ("DOE") for calculating a structure's passive heating loss.[121] After this Court granted Honeywell's second motion to dismiss,[122] the Ninth Circuit

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[118] *See United Healthcare*, 2016 WL 7378731 at *4.

[119] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[120] Infiltration rates refer to the "flow rate of outside air into a building" and are a measurement of heating efficiency. *See* Docket 222 (Honeywell's Mem.) at 39.

[121] Docket 101 at ¶ 79(A).

[122] *See* Docket 84.

reversed and remanded, finding that Relators' proposed SAC properly pled a fraud-in-the-inducement FCA claim. The Ninth Circuit specifically noted Relators' allegation that Honeywell had "falsified its estimates . . . by overwriting Department of Energy software to include non-standard values for heat infiltration."[123] In their motion for summary judgment, however, Relators present no evidence to support this allegation. While there is evidence suggesting that Honeywell did in fact use infiltration rates lower than those recommended by DOE,[124] Relators have produced no evidence that Honeywell "overwrote" the software. Instead, Relators now assert that Honeywell used artificially low projected infiltration rates for FRA's buildings, and that "Honeywell knew that the true infiltration rates for the buildings would result in a larger post-installation consumption of gas than the erroneous infiltration rates it had used for its guarantee of savings."[125]

As part of its contract proposals, Honeywell estimated the infiltration rates that would exist during the period of contract performance. These infiltration rates were used to project the costs of providing gas heat to each building.[126] In its proposals, Honeywell used values between 0.15 and 0.3 ACH as the projected

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[123] *See Berg v. Honeywell Intern., Inc.*, 580 Fed. App'x 559, 559–60 (9th Cir. 2014).

[124] *See, e.g.*, Docket 101-2 (EMP2 Audit) at 44.

[125] Docket 302-1 at 31.

[126] *See* Docket 223-61 (Berg Dep.) at 27–29.

infiltration rates.[127] Honeywell later characterized these projections as "aggressive,"[128] and some of them do seem lower than DOE suggests should be used.[129] But an FCA claim requires not only a false statement, but also a showing that the defendant knew the statement to be false when it was made. Whether a projection—even an aggressive projection—of future infiltration rates could be "false" when made presents a conceptual conundrum. Relators cite to no evidence in the record upon which a reasonable jury could find that Honeywell knew its infiltration rate projections were false statements when it made them.

Relators also alleged in their SAC that Honeywell had misrepresented an infiltration rate of 0.15 as a "normal" rate.[130] At his deposition, Timothy Berg, one of the relators and an FRA employee, explained that he based this assertion on surveying forms completed by Honeywell personnel that were submitted with the contract proposals.[131] Those forms indicated that the buildings had "normal" infiltration rates.[132] But as Mr. Berg testified, that assessment reflected "the surveyor's

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[127] *E.g.*, Docket 223-23 at 11. "ACH" refers to "air changes per hour," reflecting the insulation effectiveness of a building.

[128] Docket 265-16 (Honeywell Executive Briefing Powerpoint) at 4.

[129] *See* Docket 223-54 (DOE Manual) at 25 (recommending rates of 0.3 ACH for "tightly constructed buildings").

[130] Docket 101 at ¶ 24 ("The proposal documents knowingly and fraudulently and falsely represented that normal Department of Energy infiltration factors had been used.")

[131] *See* Docket 223-61 (Berg Dep.) at 28–29.

[132] *See, e.g.*, Docket 223-27 at 7.

interpretation of how they would rate this building" at the time of the survey, before the project had begun.[133] Thus, the forms did not indicate that the projected 0.15 ACH infiltration rates were "normal," but that the buildings' preexisting infiltration rates were normal. In any event, in their summary judgment briefing, Relators no longer press the assertion that Honeywell misrepresented a 0.15 ACH infiltration rate as "normal."

Relators instead now argue that Honeywell knew that the 0.15 ACH infiltration rates were impossible to achieve. They base this claim on comments that Steve Craig, a Honeywell executive, made during a July 25, 2006 conference call, six years after the task orders were issued. According to Relator Berg's recollection in 2010, during that 2006 conference call Mr. Craig "told everyone present that Honeywell knew the project would never save energy and was not viable from the very beginning."[134] Mr. Berg's declaration, and the Relators in their briefing, also point to a memorandum written by Randy Tyler, a government employee, two weeks after the July 2006 call. But that contemporaneous memorandum is at odds with Mr. Berg's later recollection. In Mr. Tyler's memorandum, he posits that Mr. Craig "stated that the reason the energy saving for the project could not be realized was because of the infiltration and that this was due to the building heating system controls and the occupants opening

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[133] Docket 223-61 at 28.

[134] Docket 53-1 (Berg Decl.) at 22, ¶ 44.

windows and doors in the buildings."[135] According to Mr. Tyler, Mr. Craig contended that the government had agreed to take certain measures to improve the infiltration rates, and that "*without this work*, this project was not a viable project."[136]

Relators also cite to Mr. Smith's declaration to support this claim.[137] But Mr. Smith's recollection does not offer additional support for Relators' assertion as to Honeywell's knowledge and beliefs in 2000. For Mr. Smith's declaration states only that in 2006 Mr. Craig "admitted that the project would not save energy or money"; it does not suggest that Mr. Craig said anything regarding what Honeywell knew or believed in 2000.[138]

Although the Court views the evidence in the light most favorable to Relators and draws all reasonable inferences in their favor, those "inferences are limited to those upon which a reasonable jury might return a verdict."[139] Mr. Craig's full statement does not support Relators' supposition that Honeywell knew the infiltration rates were "false" in 2000. At most, the evidence suggests that attaining the infiltration rates Honeywell projected was essential to achieving savings, and

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[135] Docket 53-21 (Tyler Aug 7, 2006 Mem.) at 2–3.

[136] Docket 53-21 at 3 (emphasis added).

[137] *See* Docket 302-1 at 31–32.

[138] Docket 52 (Smith Decl.) at 13, ¶ 30.

[139] *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995) (citing *T.W. Elec. Servs. Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987)).

those infiltration rate projections were not realized. It may be that Honeywell later blamed this failure on the government, but whether responsibility for attaining the infiltration rates belonged to Honeywell or to the government is simply irrelevant to whether the projection of low infiltration rates was knowingly false when it was made in 2000. Optimism, even ill-founded optimism, does not render a statement false.[140]

Mr. Berg's 2010 declaration is at odds with the extensive contemporaneous documentary evidence and is unsupported by any other evidence. It omits the essential context of Mr. Craig's 2006 statement—that the projected savings were conditioned on actions Honeywell believed the government would take—context that the Tyler memorandum provides. The Court finds that the declaration is insufficient to permit "a fair-minded jury [to] return a verdict for the plaintiff" on this claim, and that Honeywell is therefore entitled to judgment as a matter of law with regard to the infiltration claim.[141]

Honeywell also argues that it is entitled to summary judgment on this claim because it disclosed the

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[140] *See, e.g.*, *N. Telecom*, 52 F.3d at 815 ("[P]roof of mistakes 'is not evidence that one is a cheat,' and 'the common failings of engineers and other scientists are not culpable under the Act.' ") (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1420–21 (9th Cir. 1992)).

[141] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

infiltration rates it projected to the government.[142] But because the Court concludes that there is insufficient evidence to permit a reasonable jury to find the infiltration rates were knowingly false, it need not address whether any disclosure to the government of these rates also obviates any assertion that they were knowingly false.

D. Adjustment for Destruction of Buildings

Relators assert that "Honeywell failed to allow for adjustment of the baseline for buildings that were to be demolished."[143] Whether or not this is true, Relators do not allege, much less present evidence to support, that Honeywell did this "knowingly."[144] That is, although Relators allege that Honeywell made an error in calculating the baseline, they have not presented any evidence to demonstrate that any such error was intentional or "knowing." The FCA does not impose liability for "innocent mistakes" or "mere negligent misrepresentations."[145] Without such evidence, no

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[142] *See* Docket 222 at 39–40; Docket 223-28 at 7 (Proposal #4); Docket 265-20 (Dalsfoist Dep.) at 7 ("The infiltration rates were provided to us.").

[143] Docket 302-1 at 4.

[144] Relators' briefing does not meaningfully address this issue, referencing the omission only in a few parentheticals. *See* Docket 302-1 at 32, 34. Relators do not raise the issue again in their reply or their opposition to Honeywell's summary judgment motion.

[145] *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006) (quoting *United States ex rel. Hopper v.*

reasonable jury could conclude that the omission was done "knowingly."

VI. Relators' Opposition

Although Relators do not press the theory in their own motion for summary judgment, in their opposition to Honeywell's motion they revive their claim that Honeywell misrepresented the contracts as "legal" under the relevant ESPC statutes and regulations.[146] But a legal assertion of this type cannot form the basis of an FCA claim. While a false promise to comply with statutory or regulatory requirements might be sufficient to support an FCA claim,[147] Honeywell's proffered view of the legality of a contract is entirely different. For any such legal assertion is not a promise or statement of fact at all, so much as it is an opinion. Taking a position on a "disputed legal issue . . . is not enough to support a reasonable inference that [the claim] was *false* within the meaning of the False Claims Act."[148]

The government is just as well-situated (indeed, perhaps better situated) to assess the legality of government

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Anton, 91 F.3d 1261, 1267 (9th Cir. 1996)); *see also N. Telecom*, 52 F.3d at 815.

[146] *See* Docket 303-1 at 13.

[147] *E.g.*, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174–75 (9th Cir. 2006) (finding a plausible FCA claim premised on knowingly false assurances that the contractor would follow the law).

[148] *Hagood II*, 81 F.3d at 1477 (emphasis in original).

contracting in the complex world of the Anti-Deficiency Act and appropriations.[149] Because legal opinions can reasonably vary, they generally cannot constitute a "false" statement for purposes of the FCA. The Court "need not decide whether the defendants correctly interpreted [the applicable statutes] since a statement that a defendant makes based on a reasonable interpretation of a statute cannot support a claim under the FCA if there is no authoritative contrary interpretation of that statute."[150] Accordingly, Honeywell is entitled to summary judgment on such a claim if Relators intended to raise it.

CONCLUSION

Upon review of the extensive exhibits and portions thereof cited by the parties, and drawing all reasonable inferences in Relators' favor, the Court concludes that Defendants have met their burden to show that there is no genuine dispute as to any material fact and that Defendants are entitled to judgment as a matter of law. As detailed above, Relators have not presented sufficient evidence from which a reasonable jury could return a verdict in their favor. Defendants have demonstrated that Relators cannot show that a triable

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[149] *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 288 (4th Cir. 2002) (noting that the government "had at least as much knowledge" as the contractor-defendant "regarding Congressional authority for the [challenged conduct]").

[150] *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1190 (8th Cir. 2010).

issue exists as to whether Honeywell made a false statement in 2000 which it knew to be false at that time. For this reason, Honeywell is entitled to summary judgment on Relators' fraud-in-the-inducement claim. Because the Court grants summary judgment to Defendants, it will deny Relators' motion for partial summary judgment.

Therefore, IT IS ORDERED that Defendants' Motion for Summary Judgment at Docket 220 is GRANTED. Relators' Motion for Partial Summary Judgment at Docket 225 is DENIED.

All other pending motions are DENIED as moot. The final pretrial conference scheduled for January 9, 2017 and the trial scheduled to commence January 23, 2017 are VACATED. The Clerk of Court is directed to enter a judgment accordingly.

DATED this 29th day of December, 2016 at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS A. BERG; et al., Plaintiffs-Appellants, v. HONEYWELL INTERNATIONAL, INC. and HONEYWELL, INC., Defendants-Appellees.	No. 17-35083 D.C. No. 3:07-cv-00215-SLG District of Alaska, Anchorage ORDER (Filed Oct. 5, 2018)

Before: THOMAS, Chief Judge, and CALLAHAN and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

The motion to take judicial notice is **DENIED**.

The motion to tender transcript of oral argument is **DENIED**.

31 U.S.C. § 3729 (2019)

§ 3729. False claims

(a) Liability for Certain Acts.-

(1) In general.-Subject to paragraph (2), any person who-

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the

Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.-If the court finds that-

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the

information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.-A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.-For purposes of this section-

(1) the terms "knowing" and "knowingly"-

(A) mean that a person, with respect to information-

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"-

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that-

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government-

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or

as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licenser-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption From Disclosure.-Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.-This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99–562, §2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103–272,§4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub. L. 111–21, §4(a), May 20, 2009, 123 Stat. 1621.)

42 U.S.C. §8287 (2000)

§8287. Authority to enter into contracts

(a) In general

(1) The head of a Federal agency may enter into contracts under this subchapter solely for the purpose of achieving energy savings and benefits ancillary to that purpose. Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contract shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract.

(2)(A) Contracts under this subchapter shall be energy savings performance contracts and shall require an annual energy audit and specify the terms and conditions of any Government payments and performance guarantees. Any such performance guarantee shall provide that the contractor is responsible for maintenance and repair services for any energy related equipment, including computer software systems.

(B) Aggregate annual payments by an agency to both utilities and energy savings performance contractors, under an energy savings performance contract, may not exceed the amount that the agency would have paid for utilities without an energy savings performance contract (as

estimated through the procedures developed pursuant to this section) during contract years. The contract shall provide for a guarantee of savings to the agency, and shall establish payment schedules reflecting such guarantee, taking into account any capital costs under the contract.

(C) Federal agencies may incur obligations pursuant to such contracts to finance energy conservation measures provided guaranteed savings exceed the debt service requirements.

(D) A Federal agency may enter into a multiyear contract under this subchapter for a period not to exceed 25 years, without funding of cancellation charges before cancellation, if-

(i) such contract was awarded in a competitive manner pursuant to subsection (b)(2) of this section, using procedures and methods established under this subchapter;

(ii) funds are available and adequate for payment of the costs of such contract for the first fiscal year;

(iii) 30 days before the award of any such contract that contains a clause setting forth a cancellation ceiling in excess of $750,000, the head of such agency gives written notification of such proposed contract and of the proposed cancellation ceiling for such contract to the appropriate authorizing and appropriating committees of the Congress; and

(iv) such contract is governed by part 17.1 of the Federal Acquisition Regulation

promulgated under section 421 of title 41 or the applicable rules promulgated under this subchapter.

(b) Implementation

(1)(A) The Secretary, with the concurrence of the Federal Acquisition Regulatory Council established under section 421(a) of title 41, not later than 180 days after October 24, 1992, shall, by rule, establish appropriate procedures and methods for use by Federal agencies to select, monitor, and terminate contracts with energy service contractors in accordance with laws governing Federal procurement that will achieve the intent of this section in a cost-effective manner. In developing such procedures and methods, the Secretary, with the concurrence of the Federal Acquisition Regulatory Council, shall determine which existing regulations are inconsistent with the intent of this section and shall formulate substitute regulations consistent with laws governing Federal procurement.

(B) The procedures and methods established pursuant to subparagraph (A) shall be the procedures and contracting methods for selection, by an agency, of a contractor to provide energy savings performance services. Such procedures and methods shall provide for the calculation of energy savings based on sound engineering and financial practices.

(2) The procedures and methods established pursuant to paragraph (1)(A) shall-

(A) allow the Secretary to-

(i) request statements of qualifications, which shall, at a minimum, include prior experience and capabilities of contractors to perform the proposed types of energy savings services and financial and performance information, from firms engaged in providing energy savings services; and

(ii) from the statements received, designate and prepare a list, with an update at least annually, of those firms that are qualified to provide energy savings services;

(B) require each agency to use the list prepared by the Secretary pursuant to subparagraph (A)(ii) unless the agency elects to develop an agency list of firms qualified to provide energy savings performance services using the same selection procedures and methods as are required of the Secretary in preparing such lists; and

(C) allow the head of each agency to-

(i) select firms from the list prepared pursuant to subparagraph (A)(ii) or the list prepared by the agency pursuant to subparagraph (B) to conduct discussions concerning a particular proposed energy savings project, including requesting a technical and price proposal from such selected firms for such project;

(ii) select from such firms the most qualified firm to provide energy savings

services based on technical and price proposals and any other relevant information;

(iii) permit receipt of unsolicited proposals for energy savings performance contracting services from a firm that such agency has determined is qualified to provide such services under the procedures established pursuant to paragraph (1)(A), and require agency facility managers to place a notice in the Commerce Business Daily announcing they have received such a proposal and invite other similarly qualified firms to submit competing proposals; and

(iv) enter into an energy savings performance contract with a firm qualified under clause (iii), consistent with the procedures and methods established pursuant to paragraph (1)(A).

(3) A firm not designated as qualified to provide energy savings services under paragraph (2)(A)(i) or paragraph (2)(B) may request a review of such decision to be conducted in accordance with procedures to be developed by the board of contract appeals of the General Services Administration.

(c) Sunset requirements

The authority to enter into new contracts under this section shall cease to be effective on October 1, 2003.

(Pub. L. 95–619, title VIII, §801, as added Pub. L. 99–272, title VII, §7201(a), Apr. 7, 1986, 100 Stat. 142; amended Pub. L. 102–486, title I, §155(a), Oct. 24, 1992, 106 Stat. 2852; Pub. L. 104–106, div. E, title LVI, §5607(e), Feb. 10, 1996, 110 Stat. 702; Pub. L. 104–316, title I, §122(s), Oct. 19, 1996, 110 Stat. 3838; Pub. L. 105–388, §4(a), Nov. 13, 1998, 112 Stat. 3477.)

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42 U.S.C. § 8287a (2000)

§8287a. Payment of costs

Any amount paid by a Federal agency pursuant to any contract entered into under this subchapter may be paid only from funds appropriated or otherwise made available to the agency for fiscal year 1986 or any fiscal year thereafter for the payment of energy expenses (and related operation and maintenance expenses).

(Pub. L. 95–619, title VIII, §802, as added Pub. L. 99–272, title VII, 7201(a), Apr. 7, 1986, 100 Stat. 142.)

[SEAL] **DEPUTY SECRETARY OF DEFENSE**
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010 [SEAL]

10 DEC 1997

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Department of Defense Reform Initiative Directive #9 – Privatizing Utility Systems

The Military Departments are directed to develop a plan for privatizing all of their utility systems (electric, water, waste water and natural gas) by January 1, 2000, except those needed for unique security reasons

or when privatization is uneconomical. This plan shall include organizational requirements for conducting such privatization, and a timetable with internal benchmarks for measuring progress in achieving this goal in the interim years.

Furthermore, the Under Secretary of Defense for Acquisition & Technology is directed to develop uniform criteria for the Military Departments to apply in determining whether a facility is exempt from privatization due to economic or security considerations.

The Military Departments shall present their plans to the Defense Management Council no later than March 13, 1998.

/s/ John J. Hamre
John J. Hamre

[SEAL] **DEPUTY SECRETARY OF DEFENSE**
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010 [SEAL]

23 DEC 1998

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Department of Defense Reform Initiative Directive #49 - Privatizing Utility Systems

As you know, Defense Reform Initiative Directive (DRID) #9 directed the Military Departments to develop plans for privatizing electric, water, waste water, and natural gas utility systems, and required the

Under Secretary of Defense for Acquisition and Technology (USD(A&T)) to develop uniform criteria for the Military Departments to apply in determining security and economic exemptions from this directive. The purpose of this DRID is to reset the goal for this initiative, establish the approach to its management and oversight, and convey guidance for assessing exemptions, conducting the divestiture of utility assets using competitive procedures, and performing economic analyses of the transactions.

Since issuing DRID #9, both the number of utility systems available for consideration and the complexity of issues surrounding these transactions have multiplied. As a result the Military Departments should now revise their plans to accommodate award of privatization contracts for all utility systems no later than September 30, 2003 (except those exempted in accordance with the attached guidance). To ensure progress towards the new utility privatization goal, these new plans should also adhere to two interim milestones. The first requires the completion by September 30, 2000 of a determination for all systems of whether or not to pursue privatization. The second interim milestone requires all solicitations to be released no later than September 30, 2001.

The Military Departments shall submit revised plans for utility privatization to the USD(A&T) no later than December 23, 1998. These plans shall provide an inventory of all utility systems, including those proposed for exemption, as well as a management plan that indicates the schedule on which each system will

reach key milestones – synopses/Notice of Intent, study complete, solicitation, and contract award. The USD(A&T) will complete and submit to me an initial assessment of those plans no later than January 22, 1999.

Thereafter, the Military Departments will submit quarterly reports to the USD(A&T) describing each system's progress through the milestones. The first will be due April 15, 1999 with data as of March 31, 1999. The reports should also address to the USD(A&T) issues identified during privatization studies conducted in the previous quarter. These issues should include proposals to improve efficiency and eliminate barriers to effective privatization.

Success in this initiative will require innovative business approaches. To foster one such innovation, I encourage the Military Departments to work with one another and the Defense Energy Support Center (DESC) to initiate during 1999 at least one joint, regional utility privatization plan. The purpose of this pilot will be to provide the Military Departments an opportunity to utilize DESC services while exploring the promise of some alternative approaches to conducting these divestitures.

The attached guidance governs the privatization of electric, water, waste water, and natural gas utility systems as directed by the DRI. It sets forth the criteria for exempting systems from the privatization program, for using competitive procedures, and for conducting the economic analyses. Utility privatization

will be pursued at all major and minor installations worldwide not previously designated for closure by the Base Realignment and Closure Act. While some exemptions may be necessary, they should be rare and taken only under the authority of the Secretaries of the Military Departments. The use of competitive procedures, which already is required by statute (CICA and Section 2688), is reiterated in the guidance. The guidance establishes how the economic analyses should account for the costs of operations, maintenance, and system improvements that would be incurred by the Department if the systems were operated and maintained at accepted industry standards.

Finally, the USD(A&T) should work with the Military Departments to determine the necessity of legislative relief from two obstacles: the 10-year limitation on utility service contracts and the tax treatment of utility system conveyances.

While utility privatization presents several tough challenges it also offers great opportunities. I expect the Military Departments to work privatization hard, finding those business innovations that will garner the maximum benefit for the Department and the American taxpayer.

/s/ John J. Hamre
John J. Hamre

Attachment

Attachment

PRIVATIZATION OF DEFENSE
UTILITY SYSTEMS

I. PURPOSE

Section 2688 of title 10, United States Code, provides to the Secretary of a Military Department authority to convey all Defense utility systems, including electric, waste, waste water, and natural gas, as well as steam, hot and chilled water, and telecommunications systems. The Defense Reform Initiative (DRI) stated that the Department of Defense (DoD) would privatize all electric, water, wastewater, and natural gas utility systems, except where privatization is uneconomical or where unique security reasons require ownership by the Department. While the DRI did not specifically direct the privatization of steam, hot and chilled water, and telecommunications at this time, it does not prohibit such privatization. The DRI's objective is to get DoD out of the business of owning, managing, and operating utility systems by privatizing them. Defense Reform Initiative Directive (DRID) #9 required the Under Secretary of Defense (Acquisition and Technology) to establish guidance for the privatization of electric, water, waste water, and natural gas utility systems. This document provides that guidance.

II. SCOPE

A. Definitions

1. A "utility system" means any system for the generation and supply of electric power,

for the treatment or supply of water, for the collection or treatment of wastewater, and for the supply of natural gas. For the purpose of this definition, supply shall include distribution. A utility system includes equipment, fixtures, structures, and other improvements utilized in connection with the systems described above, as well as the easements or rights-of-way associated with those systems. A utility system does not include any projects constructed or operated by the Army Corps of Engineers under its civil works authorities nor does it include any interest in real property other than an easement or right-of-way associated with the utility system.

2. "Secretary" refers to the Secretary of the Military Department that has jurisdiction over the utility system.

3. "Military Department" or "Department" refers to the Department that has jurisdiction over the utility system.

B. The Military Departments are authorized to convey a utility system to any municipal, private, regional, district or cooperative utility company or to any other entity under this authority in accordance with applicable state and local laws. In the case of overseas utility systems, privatization will comply with appropriate agreements and applicable host nation laws.

C. The privatization of utilities and utility systems is to be conducted at all installations, both in the United States and overseas, that have utility systems available to convey. All Active Duty,

Reserve, and Guard installations, both major and minor, not currently designated for closure under the Base Realignment and Closure (BRAC) Act, will be considered candidates for utility system privatization. BRAC closure constitutes privatization of the entire installation to include utility systems. All BRAC designated installation closures will be transferred/privatized in accordance with appropriate closure laws and agreements.

D. While 10 U.S.C. 2688 governs the privatization of the utility system, the acquisition of utility services, even when a part of the privatization, is governed by 40 U.S.C. 481 and FAR Part 41.

III. EXEMPTIONS FROM PRIVATIZATION

A. The DRI exempts from privatization those utility systems that would be uneconomical to privatize, or those for which unique security reasons exist not to privatize.

B. Unique Security Reasons

1. A utility system is exempt from the privatization requirement set out in DRID #9 when either the Secretary concerned or the Principal Staff Assistant for a Defense Agency certifies to the Under Secretary of Defense (Acquisition & Technology) that unique security reasons require that the United States own the system.

2. "Unique security reasons" are situations in which:

a) ownership of the utility system by a private utility or other entity would substantially impair the mission of the Department concerned; or

b) ownership of the utility system by a private utility or other entity would compromise classified operations or property

C. Privatization is Uneconomical

1. A utility system is exempt from the privatization requirement set out in DRID #9 when either the Secretary concerned or the Principal Staff Assistant for a Defense Agency certifies to the Under Secretary of Defense (Acquisition & Technology) that privatization is uneconomical.

2. Privatization may be considered "uneconomical" only when:

a) there is a demonstrated lack of market interest, as indicated by a lack of response from any utility company or other responsive and responsible entity to an announcement of the intention to privatize; or

b) the long-term cost to the Department as a result of privatization would be greater than the long-term benefits; or

c) the long-term cost to the Department for utility services provided by the utility system concerned will not be reduced.

IV. COMPETITIVE PROCEDURES

Competitive procedures will be used in conducting the privatization of utility systems. In advance of issuance of the solicitation, the Military Departments must determine whether there is market interest in acquiring the utility system. The Departments should synopsize in the Commerce Business Daily (normally by publishing a notice of intent) and other available public media. The synopses shall indicate that the Department is considering privatizing its utilities, state the type and location of those utilities, and request that interested parties communicate their interest to a specified point of contact within the Department concerned. The synopses' results will form the basis of the competition analysis necessary for the Department to determine the proper competition strategy.

If the installation resides in an area served by a franchised and regulated utility, that franchise holder shall not be considered the presumptive conveyee, nor shall another responsible and responsive utility or entity that expresses interest be excluded from the competition. State law and regulatory policy should be considered when determining the form of competition for franchised and regulated utilities. Where state law and regulatory policy specifically prohibits competition, a sole-source negotiation may be pursued after evaluating response to the synopses. The Military Department, however, may not rely on the assertions of the franchised or regulated utility in this regard. Rather, it must make an independent legal finding that the franchised or regulated utility is the only entity

authorized to own and operate the utility system to be privatized.

A. The competitive procedures must ensure that the utility services resulting from privatization are sufficient to support installation missions in a reliable and resource efficient manner.

B. Military Departments should consider how different regulatory environments might affect the determination of rate structures for any utility service contracts entered into beyond the end of the initial utility service contract. Special consideration should be given when contracting with a utility or other entity that is not subject to price regulation or that is price self-regulated. The non- or self-regulated environment may present considerable barriers to ensuring the strength of the Department's negotiation position for the follow-on service contract. The Department shall contract in a manner that will mitigate the risk it bears in subsequent contracts. Some risk mitigation methods to consider include: contractually establishing a regulatory scheme in the initial conveyance/service contract, retaining actual land ownership, and conveying a lesser estate as considered appropriate by the Secretary and as authorized by Section 2688.

C. The solicitation shall require that if the utility system under consideration for privatization will continue in operation after conveyance, the recipient shall take all actions necessary to ensure that the system complies with all applicable legal and regulatory requirements. If the utility system under consideration for privatization will instead be

replaced, the new system must also comply with the above requirements.

D. The solicitation shall contain a provision plainly stating that the Department cannot guarantee that it will enter into a contract at the end of the solicitation process. The provision must express that the success of the solicitation is contingent upon the ability to certify to Congress that the long-term economic benefit of the conveyance exceeds the long-term economic costs, and that the conveyance will reduce the long-term costs to the Department concerned for utility services provided.

E. The Military Departments shall conduct all utility privatizations consistent with all other applicable legal and regulatory requirements, including any environmental analysis requirements.

F. After determining that privatization is uneconomical or is precluded by security considerations, efforts should be made to award an Energy Savings Performance Contract (ESPC), to competitively source the operation of those systems, or pursue other cost savings measures.

V. CONGRESSIONAL NOTIFICATION REQUIREMENTS

Section 2688 of title 10 requires that the Secretary concerned submit to the Defense Committees of Congress an analysis that demonstrates that the long-term economic benefit of the conveyance exceeds the long-term economic cost, and that the conveyance will reduce the

long-term costs to the Department concerned for utility services provided by the subject utility system. The Secretary concerned shall not proceed with conveyance of the utility system until 21 days have elapsed after the committees receive the economic analysis.

A. The economic analysis must take into account the costs for operation, maintenance, and system improvements that would be incurred by the Department if the systems were operated and maintained in accordance with accepted industry practice and all applicable legal and regulatory requirements. The direct proceeds (if any) from a conveyance and the future cost of utility services to be obtained if the conveyance is made must also be considered.

B. Methodological Assumptions and Parameters

1. The basic parameters involved in the economic analysis, such as economic life and period of analysis, are those specified in DOD Instruction 7041.3. Other parameters shall also be included in the analysis, if necessary. All parameters should be clearly explained and justified.

2. For the purposes of the economic analysis, "long-term" refers to the economic life of the utility system under consideration for privatization. (Note: Economic life of the utility system under consideration for conveyance need not be the same as the life of the contract for utility services.)

3. Life-cycle cost analysis shall be treated/conducted as specified in OMB Circular A-94.

a) Should a general inflation assumption be necessary, the inflation rate specified in section 7 of Circular A-94 is recommended. This shall be the rate used in converting costs and benefits from real to nominal values, and vice versa.

b) The discount factor utilized in the economic analysis shall be as described in section 8 of Circular A-94 and as specified in Appendix C of the circular. While the real discount rate is usually preferable, if future benefits and costs are given in nominal terms, then the nominal rate shall be used. Real and nominal values may not be combined in the same analysis.

4. Since the actual costs that the Department concerned incurs in operating and maintaining its utility systems may reflect inadequate maintenance and condition, the economic analysis must include the costs that should be incurred if the systems were operated and maintained in accordance with all applicable legal and regulatory requirements. The object of this approach is to bring a degree of parity to the costs reflected in the proposals and the economic baseline survey developed by the Department.

VI. FINANCIAL MANAGEMENT

A. Section 2688 of title 10 requires the recipient utility or entity to pay fair market value, as determined by the Secretary concerned, for the utility system. This consideration for the conveyance may be accepted in the form of a lump sum payment or

a reduction in charges for utility services provided by the utility being conveyed to the military installation at which the system is located. The treatment of a lump sum payment received in consideration for the sale of a utility system should be handled in accordance with procedures described in the Financial Management Regulations (FMR).

B. If the Secretary concerned elects to receive consideration through a reduction in charges for utility services provided to the military installation, the time period for reduction in charges for services provided by the privatized utility shall not be longer than the life of the contract for utility services.

C. When structuring an arrangement for privatization of a utility system, the Secretary concerned may require additional terms and conditions as a part of the sale of the utility system as he or she considers appropriate to protect the interests of the United States.

[SEAL]
United States
***of* America**

Congressional Record

PROCEEDINGS AND DEBATES OF THE *115TH* CONGRESS, SECOND SESSION

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Mr. GRASSLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SASSE). Without objection, it is so ordered.

Mr. GRASSLEY. Mr. President, I ask unanimous consent to speak for about 15 minutes as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

FALSE CLAIMS ACT

Mr. GRASSLEY. Mr. President, I am going to address, as I do often on the floor, problems with the False Claims Act. As author of the False Claims Act of 1986, I want to say upfront, before I talk about some problems, that this is a piece of legislation that has brought

into the Federal Treasury $56 to $57 billion of fraudulently taken money. Each year, the Department of Justice updates the amount of money that has come in under the False Claims Act, about $3 billion to $4 billion a year. We are talking about a piece of legislation I passed more than 30 years ago, that had been good for the taxpayers, to make sure their money is handled the way the law requires. Obviously, if it is taken fraudulently, it isn't handled the way the taxpayers would expect.

With that introduction, I want to bring up some problems with the False Claims Act. Today, there are some troubling developments in the courts' interpretation of the False Claims Act. To understand these developments, I want to review a little history.

In 1943, Congress gutted the Lincoln-era law known as the False Claims Act. At that time, during World War II, the Department of Justice said it needed no help from whistleblowers to fight fraud. The Department of Justice said, if the government already knows about the fraud, then no court should even hear a whistleblower's case. In 1943, Congress amended the False Claims Act to bar any whistleblower from bringing a claim if the government knows about the fraud.

Looking back at World War II, we know what they did to the False Claims Act was a big mistake because the bar led to absurd results that only hurt the taxpayers. It basically meant that all whistleblower cases were blocked, even cases where the government only knew about the fraud because of the whistleblower. In

other words, whistleblowers are patriotic people when they are reporting fraud, but it didn't make any difference because of the way the law was amended in 1943.

In 1984, the Seventh Circuit barred the State of Wisconsin from a whistleblower action against Medicaid fraud. Even today, Medicaid fraud is a major problem. We have ways of getting at it now, but in 1984 they didn't. In this case in Wisconsin, that State had already told the Federal Government about the fraud because it was required to report that fraud under Federal law. Because of the so-called government knowledge bar enacted in 1943, whistleblower cases went nowhere and neither did prosecution of wrongdoers.

Getting back to what I was involved in, in 1986, I worked with many of my colleagues—particularly a former Democratic Congressman from California by the name of Mr. Berman—to make it possible for whistleblowers to be heard again. In other words, these patriotic Americans just want the government to do what the law says it ought to be doing and money spent the way it ought to be spent. They want people to know about it so action can be taken.

In 1986, for whistleblowers to be heard again, that included eliminating the so-called government knowledge bar. Since then, what the government knows about fraud has still been used by defendants in false claims cases as a defense against their own state of mind. Courts have found that what the government knows about fraud can still undercut allegations that defendants knowingly submitted false claims. The

theory goes something like this: If the government knows about the defendant's bad behavior and the defendant knows the government knows, then the defendant did not knowingly commit fraud. That doesn't make sense, does it? Once you wrap your head around that logic or puzzle, I have another one for you.

In 2016, the question of what the government knows about fraud in False Claims Act cases began to take center stage once again. In Escobar, the Supreme Court rightly affirmed that a contractor can be liable under the "implied false certification" theory. That means a contractor can be in trouble when it doesn't make good on its bargain. And it doesn't matter whether the contractor outright lies—a misleading omission of its failures is enough.

Unfortunately, parts of the Court's ruling are getting some defendants and judges tied in knots. Justice Thomas wrote that the false or misleading aspect of the claim has to be material to the government's decision whether to pay it. Justice Thomas said that one of several ways you can tell whether something misleading is also material is if the government knows what the contractor is up to and pays the claim anyway. That is a good way for people to commit fraud. At first glance, I suppose that kind of makes sense. If someone gives you something substantially different in value or quality from what you asked for, why would you pay for it? But if the difference really isn't that important, you might still accept it.

Even if that is true, the problem here is that courts are reacting the way they always have. They are trying to outdo each other in applying Justice Thomas's analysis inappropriately or as strictly as possible, to the point of absurdity. In doing so, they are starting to resurrect elements of that old government knowledge bar that I worked so hard to get rid of in 1986. And remember, that government knowledge bar goes back to the big mistake Congress made in 1943 by eliminating it from the False Claims Act.

Justice Thomas actually wrote:

[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Justice Thomas did not say that in every case, if the government pays a claim despite the fact that someone, somewhere in the bowels of democracy might have heard about allegations that the contractor may have done something wrong, the contractor is automatically off the hook. Think about that. Why should the taxpayer pay the price for bureaucrats who fail to expose fraud against the government? That is why the False Claims Act exists—to protect taxpayers by rewarding whistleblowers for exposing fraud.

Justice Thomas said that the government's actions when it has actual knowledge that certain requirements were violated are evidence of whether those requirements are material. What does it mean for the government to have actual knowledge? Would it include one bureaucrat who suspected a violation but looked the other way? Would that prove the requirement was material? Courts need to be careful here.

First, this statement about government knowledge is not the standard for materiality. The standard for materiality is actually the same as it has always been. The Court did not change that definition in Escobar. Materiality means "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property." The question of the government's behavior in response to fraud is one of multiple factors for courts to weigh in applying the standard.

Second, courts and defendants should be mindful that Justice Thomas limited the relevance here to actual knowledge of things that actually happened. There are all sorts of situations where the government could have doubts but no actual knowledge of fraud. Maybe the government has only heard vague allegations but has no facts. Maybe the rumors are about something that may be happening in an industry but nothing about a particular false claim by a particular defendant. Maybe an agency has started an inquiry but still has a long way to go before that inquiry is finished. Maybe someone with real agency authority or responsibility hasn't learned of it yet. There are a lot of

situations where the government might not have actual knowledge of the fraud.

Third, even if the government does pay a false claim, that is not the end of the matter. Courts have long recognized that there are a lot of reasons why the government might not intervene in a whistleblower case. There are a lot of reasons why the government might still pay a false claim. Maybe declining to pay the claim would leave patients without prescriptions or lifesaving medical care. Paying the claims in that case does not mean that the fraud is unimportant; it means that in that moment, the government wants to ensure access to critical care. That payment cannot and does not deprive the government of the right to recover the payment obtained through fraud.

Can you imagine if that were the rule? Can you imagine if providers could avoid all accountability because the government decided not to let someone suffer? Then fraudsters could hold the government hostage. They could submit bogus claims all the time with no consequences because they know the government is not going to deny treatment to the sick and the vulnerable. That is just not what the False Claims Act says. Courts should not read such a ridiculous rule into that statute.

Fourth, courts should take care in reading into the act a requirement for the government to immediately stop paying claims or first pursue some other remedy. There could be many important reasons to pay a claim that have nothing to do with whether the fraud is

material. Further, there is no exhaustion requirement. The False Claims Act does not require the government to jump through administrative hoops or give up its rights. And that would be an unreasonable burden on the government, in any event.

We have decades of data showing that the government cannot stop fraud by itself—hence the importance of whistleblowers; hence the importance of the False Claims Act. I also know from many years of oversight that purely administrative remedies are very time consuming and often toothless.

The government should be able to decide how best to protect the taxpayers from fraud. The False Claims Act is the most effective tool the government has. The government should be able to use it without the courts piling on bogus restrictions that are just not law.

I started with the importance of the False Claims Act. It has brought $56 billion to $57 billion into the Treasury since its enactment in 1986. Each year, the Department of Justice updates the law, usually reporting $3 billion or $4 billion coming in under that act in the previous year.

I hope the courts understand that every bureaucrat in government has to have the opportunity to report what is wrong so that we make sure the taxpayers' money is properly spent.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

[SEAL] **DEPARTMENT OF THE ARMY** [SEAL]
HEADQUARTERS, U.S. ARMY ALASKA
600 RICHARDSON DRIVE #5000
FORT RICHARDSON, ALASKA 99505-5000

REPLY TO
ATTENTION OF:

APVR-RPW 14 September 2000

MEMORANDUM FOR Commander, U.S. Army Engineering and Support Center, Huntsville, ATTN: CEHNC-PM-CR (Arthur Martin), 4820 University Square, Huntsville, AL 35816-1822

SUBJECT: Request Award of ESPC Task Order #8 – Phase One Decentralization of the Central Plant – Fort Richardson

1. United States Army Alaska (USARAK) requests the award of ESPC Task Order #8 – Decentralization of the Central Plant – Fort Richardson.

2. The purpose of this task order is:

a. The installation of local stand-alone natural gas fired heating systems in 73 buildings presently utilizing the Central Heating and Power Plant (CH&PP) building #36012 as their source of heating energy.

b. The installation of a Building Management and Control System in 72 buildings. The new BMCS shall provide monitoring and control of the mechanical equipment installed under the mechanical systems upgrades listed in paragraph a.

3. The total annual energy savings, as a result of this improvement is $464,239.

4. The total annual ancillary savings, as a result of this improvement is $2,260,000 with an additional $250,000 every two years and $200,000 every five years for the length of the task order.

/s/ Richard G. Thompson
RICHARD G. THOMPSON
LTC(P), EN
Director Public Works

[SEAL] **DEPARTMENT OF THE ARMY**
HEADQUARTERS, U.S. ARMY GARRISON, ALASKA
600 RICHARDSON DRIVE #5000
FORT RICHARDSON, ALASKA 99505-5000

REPLY TO
ATTENTION OF:

APVR-RPW 13 December 2000

MEMORANDUM FOR Commander, U.S. Army Engineering and Support Center, Huntsville, ATTN: CEHNC-PM-CR (Arthur Martin), 4820 University Square, Huntsville, AL 35816-1822

SUBJECT: Request Award of ESPC Task Order #9 – Phase Two Decentralization of the Central Plant, Fort Richardson.

1. United States Army Alaska (USARAK) requests the award of ESPC Task Order #9 – Decentralization of the Central Plant, Fort Richardson.

2. The purpose of this task order is:

a. The installation of local stand-alone natural gas fired heating systems in 237 buildings presently utilizing the Central Heating and Power Plant (CH&PP) building #36012 as their source of heating energy.

b. The installation of a stand alone Building Management and Control System in 236 buildings.

3. The total annual energy savings, as a result of the Phase Two Project is $828,370.00.

4. The total ancillary savings as a result of the Phase Two Project is:

a. Annual for contract term – $1,440,723.00

b. Annual for the first ten years – $455,300.00

c. Every two years – $200,000.00

d. Every five years – $150,000.00

5. The point of contact for this action is Paul Knauff, at 907-384-3043.

/s/ Richard G. Thompson
RICHARD G. THOMPSON
COL, EN
Director, Public Works